

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:)	Bankr. No. 03-30093
)	Chapter 7
WILLIAM BRUCE HOPE)	
f/d/b/a The South Dakota Store)	
f/k/a Bruce W. Benham)	
Soc. Sec. No. 503-56-5322)	
)	
and)	DECISION RE: TRUSTEE'S
)	AMENDED MOTION TO APPROVE
LORI LYNN HOPE)	SALE OF INVENTORY AND
Soc. Sec. No. 476-96-3263)	EQUIPMENT OF SOUTH DAKOTA
f/k/a Lori L. Carlson)	STORE FREE AND CLEAR OF LIENS
)	
Debtor.)	

The matter before the Court is the Amended Motion to Approve Sale of Inventory and Equipment of South Dakota Store Free and Clear of Liens filed by Trustee John S. Lovald on October 8, 2003, and the several objections and responses to the Trustee's original and amended sale motions. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Trustee's proposed sale shall be approved only as to those items that are property of the bankruptcy estate.

I.

From Chamberlain, South Dakota, William B. Hope¹ operated a retail store and website known as the South Dakota Store. His wife, Lori L. Hope, worked for the Evangelical Lutheran Church

¹ Mr. Hope's prior name was Bruce Benham. Ms. Hope's maiden name was Lori Carlson.

of America. On August 14, 2003, William and Lori Hope ("Debtors") filed a joint Chapter 7 petition in bankruptcy. Among their assets, Debtors scheduled "SD Store Equipment (antique display cases, etc.)," which they valued at \$3,000, and "SD Store Inventory[,] Chamberlain SD," which they valued at \$150,000. Though their Schedule C of claimed exemptions was a bit unclear, it appeared that they declared exempt \$2,293 of the store's inventory and \$1,000 of the store's equipment. The Trustee's objection to claimed exemptions, which addressed the clarity issue, was sustained. Thus, Debtors' exempt property under S.D.C.L. § 43-45-4 was limited to \$10,000 in value.

In their schedule of creditors holding unsecured claims, Debtors listed 88 claims totaling \$233,158. Many of the claims were for goods provided to the South Dakota Store. Debtors also scheduled four secured creditors. Included was Great Western Bank with a fully secured claim of \$13,066. Debtors stated the Bank held a purchase money security interest on unspecified property and also a blanket lien on business property, including equipment, fixtures, and inventory. Debtors also listed the Areawide Business Council and the City of Chamberlain as fully secured creditors. They stated these creditors held a security interest in inventory. The Areawide Business Council's claim was scheduled at \$11,530, and the City of Chamberlain's claim was scheduled at \$10,690. Thus, the total liens against the

store's inventory were stated on Debtor's schedules to be \$35,286. Subsequently, the case trustee and Areawide Business Council advised the Court that a dispute might exist regarding the perfection of Areawide's security interest.

In their Statement of Financial Affairs, Debtors disclosed that Debtor William Hope operated the South Dakota store from the spring of 1999 until the late summer of 2003, and that the store incurred a substantial loss each year: <\$20,000> in both 2001 and 2002 and <\$12,000> in 2003. In response to question 14 on their Statement of Financial Affairs, Debtors did not list any property that they did not own but were holding for someone else. They did state that they intended to surrender the South Dakota Store's inventory and website to Great Western Bank.

On August 27, 2003, the case trustee, John S. Lovald, filed a motion seeking approval of an auction sale of the store's inventory and equipment. Trustee Lovald proposed that the items would be sold free of liens or other encumbrances held by Great Western Bank or the City of Chamberlain, but that the liens and encumbrances would attach in order of priority to the auction sale proceeds. Trustee Lovald also stated in his sale motion that some property to be sold probably had been consigned to Debtor William Hope for sale. If any of these consignors objected to the sale, he asked that the Court determine who had the priority interest in the store's inventory -- the Bank and

the City as the secured creditors in Debtors' store inventory or the various consignors.

As Trustee Lovald predicted, several parties objected to his sale motion on the grounds that they had consigned goods with the South Dakota Store and that they had received neither payment for the goods nor a return of the items. These parties were:

Audrey Handsel: three denim quilts and seven denim pillows and, as an agent for Donna L. Gilmour, d/b/a Over the Hill Products, five boot lamps;

Dale E. Springer: oak and glass coffee table with two pheasants;

Lidskov Fur: two buffalo skulls and two buffalo robes; and

Ronald D. Backer: three oil paintings and twelve prints.

They each wanted their unsold goods returned to them. Areawide Business Council also objected to the motion because the sale motion did not recognize it as a secured creditor. It asked that its lien attach to the sale proceeds, also.² Another objector, Clint Larson of Missouri Valley Taxidermy, said he had given the South Dakota Store a mounted walleye for display purposes only, not resale. He asked that it be returned.

² Areawide Business Council later advised the Court that it would not actively participate in this contested matter as it was unclear whether even the secured creditors with higher priority would be paid in full after the proposed auction.

A hearing on the sale motion and objections was held October 6, 2003. That day, Debtor submitted a list of property that he stated was property held for another; the list contained 44 names and addresses of consignors and briefly described the property consigned. The list was docketed by Debtors as an amendment to their Statement of Financial Affairs wherein they previously had stated they did not hold any property for another. Debtors' counsel also advised the Court that many of the people on the list probably had not received notice of the Trustee's sale motion because they were not on the original case mailing list. Consequently, the Court directed Trustee Lovald to file an amended sale motion and to serve it on those who had not previously received notice of his proposed sale of the store's inventory. Debtor amended the case mailing list so that the Trustee could complete this service.

At the October 6, 2003, hearing, the Court and counsel for parties in interest concurred that the legal issue to be resolved was whether the secured claim holders had an interest in the store's inventory, including the consigned goods, that was higher in priority than the interest of the consignors who wanted their property back. The Court set a deadline for interested parties to file a brief on that issue. The matter would then be taken under advisement after any objections to the Trustee's amended sale motion were filed.

Trustee Lovald filed and gave notice of his amended sale motion.³ The Court received several objections to the amended sale motion from people who stated they had consigned goods to the South Dakota Store that they wanted back. These parties were:

Sally & Charles Meyer:	Angora goat pelt;
Victor H. Runnels:	two original pictograph ledger drawings, framed and matted under glass;
Richard D. Bower:	very large, old buffalo skull in a custom display case;
Beth M. Roberts:	twenty-six framed pictures;
Nancy S. Hun:	unspecified artwork;
Oscar Thompson and/or Eldon Asbenson:	cedar chest, one small cherry jewelry case, two marble top tables, two square beveled glass mirrors, marble top table, wooden baby cradle, two Purple Martin bird houses, one framed picture, one pipe box, two ratchet stands, and one butternut coffee table with buffalo leather;
Lyle W. Miller, Sr.:	two hand painted pictures, four hand painted feathers, and a black bone hair pipe choker with nickle plated beads and abalone disk;

³ The notice of the Amended Sale Motion stated those who had objected to the earlier sale motion did not need to file another objection to the Amended Sale Motion.

Susan Smith: 1934 Coca Cola sign and two
tire hub clocks; and

Mary Green Vickrey: six compact discs, three
tapes, and one sample compact
disc.

In addition, Susan Smith advised the Court (through a letter from her attorney addressed to Trustee Lovald) that she had lent the South Dakota Store four antique wooden folding chairs for display only, not for resale.

Briefs were filed by Beth Roberts, Oscar Thompson, Victor H. Runnels, Ronald Backer, Trustee Lovald, and Great Western Bank. In his brief, Trustee Lovald stated that both Great Western Bank and the City of Chamberlain were claiming a blanket security interest in the South Dakota Store's inventory. He stated that the Secretary of State's report indicated that none of the store's several consignors filed a financing statement to provide evidence of their interest in the inventory. Citing S.D.C.L. § 57A-2-326, Trustee Lovald argued that the consignors, by delivering property to the South Dakota Store primarily for resale, subjected that property to the claims of the creditors of the South Dakota Store. Attached to his brief were several different types of receipts indicating the goods placed with the store. Trustee Lovald also attached the two financing statements that the City of Chamberlain and Great Western Bank had filed with the Secretary of State. Both clearly provided that these two creditors were taking a secured interest in the

inventory at the South Dakota Store.

In its brief, the Bank cited several decisions by the South Dakota Supreme Court for the proposition that if the owner of collateral allows another to appear as the owner or allows another to dispose of the collateral so that a third party is led into dealing with the apparent owner as if he were the actual owner of the property, then the actual owner is estopped from asserting that the apparent owner did not have rights in the collateral. The Bank further stated that South Dakota case law provides that the actual owner must protect his interest in the property by filing a financing statement with the South Dakota Secretary of State. Based on this case law, the Bank argued that the several consignors had allowed William Hope to treat the consigned property as his own and that they were now estopped -- or prohibited -- from claiming any rights to the property since they had not filed a financing statement. The Bank did not cite the statutory provisions of the Uniform Commercial Code on which it relied.

In his brief, Oscar Thompson argued that S.D.C.L. § 57A-2-326 no longer applied to consignments following amendments to the Code in 2000. The other briefs by other consignors relied on equitable principals.

II.

APPLICATION OF THE UNIFORM COMMERCIAL CODE.

The Uniform Commercial Code ("U.C.C."), as adopted in South

Dakota, governs several types of business transactions in the state, including sales and secured transactions. S.D.C.L. Title 57A. Several provisions address consigned goods. Recently, the chapter on secured transactions was substantially revised. Several changes related to consignments. There is limited case law interpreting these new provisions.

It is undisputed that all consignors in this case delivered their wares to the South Dakota Store with the understanding that the store would offer them for sale and then pay the consignors if the goods sold or return the goods to the consignor if the goods did not sell. Consignments as defined under the U.C.C., however, are no longer part of the sales chapter of the U.C.C. at S.D.C.L. ch. 57A-2.⁴ Instead, they are

⁴ Prior to amendment in 2000, S.D.C.L. § 57A-2-326 provided:

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(a) A "sale on approval" if the goods are delivered primarily for use; and

(b) A "sale or return" if the goods are delivered primarily for resale.

(2) Except as protected by subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this section are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this section is not applicable if the

now governed by the secured transactions chapter at S.D.C.L. ch. 57A-9. S.D.C.L. §§ 57A-2-102 and 57A-9-109(a)(4); U.C.C. § 2-326 cmt. 4 (2003); and U.C.C. § 9-109 cmt. 6 (2003). This change is reflected in part by the specific terms of S.D.C.L. § 51A-9-109(a)(4), by the fact that a "sale" under S.D.C.L. § 57A-2-106(1) constitutes a "passing of title from the seller to the buyer . . . ," and by the fact that a "buyer," as defined by S.D.C.L. § 57A-2-103(1)(a), is distinguishable from a "consignee," as defined by S.D.C.L. § 7A-9-102(a)(19). See Prof. G. Ray Warner, *Consigned to Confusion: Consignments under Revised Article 9*, 20-Jan. Am. Bankr. Inst. J. 30, 30-31 (2002);

person making delivery:

- (a) Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or
- (b) Establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others; or
- (c) Complies with the the filing provisions of the chapter on secured transaction (chapter 57A-9).

(4) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this chapter (§ 57A-2-201) and as contradicting the sale aspect of the contract within the provisions of this chapter on parol or extrinsic evidence (§ 57A-2-202).

S.D.C.L. § 57A-2-326 (2000). The 2000 Legislature, as part of the revisions to Chapter 57A-9, deleted all references to consignments in § 57A-2-326 and realigned those provisions into ch. 57A-9. See discussion in Prof. G. Ray Warner, *Consigned to Confusion: Consignments under Revised Article 9*, 20-Jan. Am. Bankr. Inst. J. 30 (2002). Section 57A-2-326's catchline, which still references consignments, may be a misnomer. Section 2-326 of the U.C.C. as adopted by the National Conference of Commissioners on Uniform State Laws now uses the catchline "Sale On Approval And Sale Or Return; Rights of Creditors."

68A Am. Jur. 2d *Secured Transactions* §§ 108 and 301 (database 2003); U.C.C. § 2-326 cmt. 4 (2003); and U.C.C. § 9-109 cmt. 6 (2003).

Definitions of key terms in Chapter 57A-9, though often tedious, provide the framework for applying the substantive law set forth in the chapter. A "consignment" is "a transaction . . . in which a person delivers goods to a merchant for the purpose of sale[.]" S.D.C.L. § 57A-9-102(a)(20). "Goods" are "all things that are movable when a security interest attaches." S.D.C.L. § 57A-9-102(a)(44). In this case, goods include the art work and other tangible ware that the many consignors placed with the South Dakota Store for sale. The person who places the goods with the merchant is the "consignor." S.D.C.L. § 57A-9-102(a)(21). The merchant who receives the consigned goods is the "consignee." S.D.C.L. § 57A-9-102(a)(19).

When a consignor places goods with a merchant, even though their agreement does not specifically create a security interest, the consignor acquires a special kind of security interest under the U.C.C. that is deemed a "purchase-money security interest in inventory." S.D.C.L. § 57A-9-103(d). The "property subject to a security agreement" is defined as "collateral." S.D.C.L. § 57A-9-102(a)(12). Collateral specifically includes "goods that are the subject of a consignment." S.D.C.L. § 57A-9-102(a)(12)(C). Consequently,

under Chapter 57A-9, a consignee is also known as a "debtor," S.D.C.L. § 57A-9-102(a)(28)(C), and the consignor is also identified as a "secured party." S.D.C.L. § 57A-9-102(a)(72)(C).

Under the U.C.C., a consignor must take certain steps to protect his property from the claims of the merchant's existing and future creditors. The consignment agreement must be in writing or be otherwise authenticated by the merchant-debtor. S.D.C.L. § 57A-9-203(b)(3)(A). The consignor must file a notice of his interest in the consigned goods with the Secretary of State within twenty days after the consignor delivers the goods to the merchant.⁵ S.D.C.L. §§ 57A-9-317(a)(2), 57A-9-317(e), and 57A-9-322(a)(1). Also, the consignor must give notice of the consignment to the merchant's existing inventory creditors *before* he delivers any goods to the merchant. S.D.C.L. § 57A-9-324(b).

That said, not all consignments are covered by the U.C.C. To meet the U.C.C.'s definition of a consignment, the merchant must also deal in "goods of that kind under a name" different from the consignor's name, S.D.C.L. § 57A-9-102(a)(20)(A)(i), not be an auctioneer, S.D.C.L. § 57A-9-102(a)(20)(A)(ii), and

⁵ If the consignment falls under the U.C.C., a consignor must file a notice of his interest in the consigned goods to also protect that interest from the case trustee's strong arm powers under 11 U.S.C. § 544(a) should the merchant-debtor file bankruptcy.

not be generally known by his creditors "to be substantially engaged in selling the goods of others[.]"

S.D.C.L. § 57A-9-102(a)(20)(A)(iii). If the merchant meets this U.C.C. definition, then the goods presented to the merchant must be considered. The goods must have an aggregate value of \$1,000 or over when delivered, S.D.C.L. § 57A-9-102(a)(20)(B), the goods must not have been consumer goods immediately before they were delivered, S.D.C.L. § 57A-9-102(a)(20)(C), and the transaction must not have specifically created "a security interest that secures an obligation." S.D.C.L. § 57A-9-102(a)(20)(D).

In this case, the many consignments at issue in this case do not fall under the revised Article 9 of the U.C.C. because Debtor William Hope does not meet the definition for a merchant.⁶ It is true that Debtor William Hope operated the store under the name of the South Dakota Store, which was different from any of the consignors' names, as required by S.D.C.L. § 57A-9-102(a)(20)(A)(i). Further, Debtor William Hope was not an auctioneer as required by S.D.C.L. § 57A-9-102(a)(20)(A)(ii). It is the third criteria for a merchant at S.D.C.L. § 57A-9-102(a)(20)(A), however, that Debtor William Hope does not meet.

⁶ There has been no claim that any of the consignments at issue specifically created a security interest which would have brought the transaction under S.D.C.L. ch. 57A-9 directly via § 57A-9-109(a)(1).

As set forth above, for a consignment to fall under ch. 57A-9, the merchant to whom the consignor delivered goods must be generally *not* known by his creditors to be substantially engaged in selling the goods of others. S.D.C.L. § 57A-9-102(a)(20)(A)(iii).⁷ Here, the record reflects that the South Dakota Store's creditors did generally know that the store's business included the selling of fine art and hand-made crafts and decorative items consigned by others. That, in essence, is what the store was -- a collection of South Dakota wares made by South Dakotans. Further, these consigned goods were a substantial part of the South Dakota Store's business as demonstrated by comparing the inventory⁸ taken by Trustee Lovald that is attached to his sale motion with the list of consignors

⁷ The essential provisions of S.D.C.L. § 57A-9-102(a)(20)(A) were found in S.D.C.L. § 57A-2-326(3)(b) prior to amendment in 2000. Some courts have found that this subsection is satisfied if the consignor shows that the secured creditor, who claims a priority lien in the consigned goods, had actual knowledge of the consignment. See, e.g., *Belmont International, Inc. v. American International Shoe Co.*, 972 F.2d 1527 (9th Cir. 1992)(following certification of question, 831 P.2d 15, 18-19 (Or. 1992)(cites therein); *GBS Meat Industry Pty. Ltd. v. Kress-Dobkin Co.*, 474 F. Supp. 1357, 1362 (W.D. Pa. 1979), *aff'd*, 622 F.2d 578 (3rd Cir. 1980); *Eurpac Service Inc. v. Republic Acceptance Corp.*, 37 P.3d 447, 450-51 (Colo. Ct. App. 2000); and *First National Bank of Blooming Prairie v. Olsen*, 403 N.W.2d 661, 665 (Minn. Ct. App. 1987); but see *Multibank National Of Western Massachusetts v. State Street Auto Sales, Inc. (In re State Street Auto Sales, Inc.)*, 81 B.R. 215, 218-20 (Bankr. D. Mass. 1988). We need not reach that question here.

⁸ Display cases and racks listed on the Trustee's inventory are excluded from the comparisons since they were not goods offered for sale by the South Dakota Store.

that Debtors filed as an amendment to their Statement of Financial Affairs and by comparing the number of business creditors on Debtors' schedules with Debtors' list of consignors. Accordingly, since Debtor William Hope was generally known by his creditors to be substantially engaged in the consignment business, this Court concludes that none of the consignments to the South Dakota Store meet the definition for consignments at S.D.C.L. § 57A-9-102(a)(20)(A). Thus, they are not governed by Article 9 of the U.C.C.

Many of the consignments in this case also fall outside Article 9 of the U.C.C. because the value of the goods at the time of delivery had an aggregate value of less than \$1,000, contrary to the requirement of § 57A-9-102(a)(20)(B). As stated in Official Comment 14 to U.C.C. § 9-102, consignments such as these are excluded from Article 9 as "transactions for which filing would be inappropriate or of insufficient benefit to justify the costs." That is certainly evident with the many consignments in this case.

If a consignment does not fall under Article 9 of the U.C.C., it is not abundantly clear, especially following the recent amendments, what law governs. Official Comment 14 to § 9-102 of the U.C.C., as adopted by the National Conference of Commissioners on Uniform State Laws, assures us that non-qualifying consignments are not governed by Article 9. U.C.C.

§ 9-102 cmt. 14 (2003). Official Comment 6 to the U.C.C. § 9-109 reinforces the distinction between consignments covered under the secured transactions article of the U.C.C. and a "sale or return" under the sales article. U.C.C. § 9-109 cmt. 6 (2003). Most important, this Official Comment states, "This Article [on secured transactions] does not apply to bailments for sale that fall outside the definition of 'consignment' in Section 9-102 and that do not create a security interest that secures an obligation." *Id.*

Commentators on the revised U.C.C. concur that it is not clear what law applies to consignments that do not meet the definition under § 9-109(a)(20). One commentator has opined that a consignment that does not meet the definition of § 9-109(a)(20) might still be a "sale or return" under § 2-326. Bruce S. Nathan, *Consignments the Wrong Way*, 21-Nov. AM. BANKR. INST. J. 14, 37 n.7 (2002). Another has concluded that such "orphan" consignments are treated under other state statutes or common law. Warner, *Consigned to Confusion: Consignments under Revised Article 9*, 20-Jan. Am. Bankr. Inst. J. at 31 and 40. A third, at best, echoes the lack of clarity in the revisions. 1D BENDER'S UNIFORM SECURED TRANSACTION SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 33.04 (2003). Recently, one court, with little discussion, used U.C.C. § 2-326 as the fall back provision. *In re Morgansen's Ltd.*, 2003 WL 23021946

(Bankr. E.D.N.Y. 2003).

In light of the Official Comments to the revised U.C.C. discussed above and Warner's clearer discussion in his article cited above, this Court concludes that "orphan" consignments do not fall back under S.D.C.L. § 57A-2-326 as a "sale or return." Instead, other non U.C.C. state law must govern them. Accordingly, under the facts presented in this case, Trustee Lovald, the South Dakota Store's many consignors, and secured creditors Great Western Bank and the City of Chamberlain must look to other applicable state law to determine their respective rights and priorities to items in the South Dakota Store's inventory.

III.
BAILMENTS FOR SALE IN SOUTH DAKOTA.

That a consignee of property does not take title to the property has long been recognized in this state. *Powell v. Kechnie*, 19 N.W. 410, 411 (Dakota 1884). While the bailment continues, creditors of the consignee cannot levy on the property. *Id.* at 411-12. A bailment under South Dakota's common law is dependent on the parties' intentions and understandings. *Rauber v. Sundback*, 46 N.W. 927, 928-930 (S.D. 1890). Written documentation of the transaction, if any, is considered. *Id.* The terms of the agreement, if doubtful or obscure, are analyzed and compared with each other and with other statements about the agreement. *Id.* Such contracts of agency are recognized under South Dakota's code. S.D.C.L. §§ 59-3-13 and 59-3-14 and ch. 59-9. The agreement need not be in writing. S.D.C.L. § 56-1-8.

The type of agent who agrees to sell property for the owner is a factor. S.D.C.L. § 59-9-1. The factor has "ostensible authority" to deal with the property of the principal when dealing with others who are unaware of the agency relationship. S.D.C.L. § 59-3-3 (definition of ostensible authority) and § 59-9-8 (recognition of such authority in the factor).

In contrast to a transfer of property, S.D.C.L. §§ 43-4-1 and 43-4-17, a conveyance of title does not take place when a

factor receives property from the principal. Instead, title to the personalty passes from the principal directly to the buyer. S.D.C.L. § 43-35-5. Further, the factor is not liable to the principal for payment until the goods have been sold to a buyer. *Inner Shoe Tire Co. v. Knapp Brown & Co.*, 163 N.W. 572, 573 (S.D. 1917); *Sioux Remedy Co. v. Lindgren*, 130 N.W. 49, 52-53 (S.D. 1911)(overruled in part on different issue by *Sioux Remedy Co. v. Cope*, 133 N.W. 683 (S.D. 1911)).

Under the applicable bailment law in South Dakota, it is clear that Debtor William Hope never took title to or had any ownership interest in the many goods consigned to the South Dakota Store. Further, the consignors did nothing to clothe Debtor with an indicia of ownership. *First National Bank of Philip v. Temple*, 642 N.W.2d 197, 204-05 (S.D. 2002)(owner of collateral may be estopped from disputing security interest given in collateral if owner clothed the debtor with the indicia of ownership). Accordingly, Debtor William Hope had no interest in the consigned goods to which his creditors' security interests could attach. *Id.* at 204 (a debtor can convey to a creditor no more rights in an asset than the debtor possesses). The consigned property remains outside the bankruptcy estate, 11 U.S.C. § 541(b), and also outside the secured claims of

creditors Great Western Bank and the City of Chamberlain.⁹

The consignors' ownership interests in the consigned goods are also not subject to Trustee Lovald's strong arm powers under 11 U.S.C. §§ 544(a)(1) or (2). Debtor William Hope, on the petition date, did not have any interest in these consigned goods that could be defeated by Trustee Lovald stepping into the shoes of a creditor holding a hypothetical judicial lien or the shoes of a creditor holding an unsatisfied execution. See *In re Valley Media, Inc.*, 279 B.R. 105, 132-33 and 133 n.58 (Bankr. D. Del. 2002)(discussion under old law at U.C.C. § 2-326(3) of the impact of a trustee's § 544(a) powers on consigned property).

Since the consigned goods are not a part of the bankruptcy estate, Trustee Lovald may not sell them with the estate's assets.¹⁰ The consignors, however, must share with Trustee Lovald the cost of storing their goods during the administration of the case. 11 U.S.C. §§ 105(a) and 721. If a reasonable agreement with a particular consignor cannot be reached on this cost sharing, Trustee Lovald may bring the issue to the Court. Ultimately, Trustee Lovald, with cooperation from Debtors and

⁹ Any display cases or racks that a consignor may have placed at the store to promote his goods is also excluded from property of the bankruptcy estate and from the secured creditors' claims.

¹⁰ Some consignors may welcome the opportunity to sell their goods during Trustee Lovald's proposed auction. If so, they may negotiate the terms directly with Trustee Lovald.

their attorney, will need to review any paperwork the store may have or the consignors may have furnished, identify all the consigned goods,¹¹ and advise the consignors to pick up their property. Trustee Lovald will not be responsible for delivering the consigned goods.

IV.

Not all the goods held by the consignors-objectors are excluded from Trustee Lovald's sale. In particular, Audrey Handsel provided four denim quilts and 14 denim pillows to the South Dakota Store, but that transaction was a sale rather than a consignment. The terms on her June 24, 2003, sales form was "Net 30 days." That, of course, means that the goods were not placed with the store on consignment, but that the store was to pay Handsel for them within thirty days, regardless of whether the store had sold them to a customer. *Hillside Enterprises, Inc. v. Continental Carlisle, Inc.*, 147 F.3d 732, 734-35 (8th Cir. 1998); *Avery Dennison Corp. v. The Home Trust & Savings Bank*, 2003 WL 22697175, slip op. at 1 (N.D. Ia. 2003) ("net 30 days" means the buyer is allowed 30 days from the invoice date to pay that invoice). Similarly, Lidskov Fur provided some goods to the store on consignment and some were sold to the store. Its June 7, 2003, invoice provided that two buffalo

¹¹ An effort should be made to identify all goods that were consigned, not just those owned by objectors to Trustee Lovald's sale motion and amended sale motion.

skulls were sold to the store with payment to be made in 60 days. In contrast, the same invoice provided that two buffalo robes were placed with the store on consignment only. Accordingly, those items that were sold to the store remain a part of the store's inventory, which Trustee Lovald may sell at auction. The parties who sold the goods to the store will have an unsecured claim against the estate for the sums owed them.

Finally, those goods that were lent to the South Dakota Store for display purposes only (not for sale or consignment) are also not property of the bankruptcy estate, and they may not be sold as a part of Trustee Lovald's sale. Based on the record to date, these "display only" items include a mounted walleye placed at the store by Clint Larson and four antique wooden folding chairs placed at the store by Susan Smith. These items must also be returned to the owner, and the owner shall bear his or her share of any storage costs incurred by Trustee Lovald.

An appropriate order will be entered.

Dated this 15th day of January, 2004.

BY THE COURT:

/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:

Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk
(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:) Bankr. No. 03-30093
) Chapter 7
WILLIAM BRUCE HOPE)
f/d/b/a The South Dakota Store)
f/k/a Bruce W. Benham)
Soc. Sec. No. 503-56-5322)
) ORDER GRANTING TRUSTEE
) LOVALD'S
and) AMENDED SALE MOTION IN PART
) AND
) DENYING THE MOTION IN PART
) AND
LORI LYNN HOPE) DIRECTING CONDITIONAL RETURN
Soc. Sec. No. 476-96-3263) OF NON ESTATE PROPERTY
f/k/a Lori L. Carlson)
)
Debtor.)

In recognition of and compliance with the Decision entered this day,

IT IS HEREBY ORDERED that Trustee John S. Lovald's October 8, 2003, Amended Motion to Approve Sale of Inventory and Equipment of South Dakota Store Free and Clear of Liens is GRANTED in part and DENIED in part as follows:

Trustee Lovald may sell at auction all items listed on Exhibit A to his Amended Motion except those goods which were consigned by others to Debtors for sale at the South Dakota Store or through the store's website or those goods that were lent to the South Dakota Store for display purposes only. Debtors and their counsel shall promptly and fully cooperate with Trustee Lovald in identifying all consigned goods or display-only items and Trustee Lovald shall give notice to those owning consigned goods or display-only items of the date, time, and place to repossess their property.

and,

IT IS FURTHER ORDERED that all owners of non bankruptcy estate property that was consigned with the South Dakota Store or its web site or that was displayed but not offered for sale at the South Dakota Store shall pick up and take possession of their items on the date, time, and place set by Trustee

Lovald and shall pay Trustee Lovald their reasonable share of any storage costs incurred by Trustee Lovald during the administration of this case. Any storage costs must be paid to Trustee Lovald before a party may repossess their property.

So ordered this 15th day of January, 2004.

BY THE COURT:

/s/ Irvin N. Hoyt

Irvin N. Hoyt

Bankruptcy Judge

ATTEST:

Charles L. Nail, Jr., Clerk

By: _____

Deputy Clerk

(SEAL)